IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 11, 2005 Session

TERRY SULLIVAN, Administrator of the Estate of Charlie Sullivan v. CHATTANOOGA MEDICAL INVESTORS, LP dba CENTERVILLE HEALTH CARE CENTER, ET AL.

Appeal from the Circuit Court for Hickman County
No. 02-5088C II Russ Heldman, Judge

No. M2004-02264-COA-R3-CV - Filed January 26, 2006

Terry Sullivan, in his capacity as the Administrator of the Estate of his father, Charlie Sullivan ("the deceased"), filed this action against the owners[1] of Centerville Health Care Center ("the defendant") and the owners of another nursing home, alleging that they were culpable in his father's death. The defendant filed a motion for summary judgment. It argued that the applicable one-year statute of limitations barred the plaintiff's action. The plaintiff responded to the motion by asserting that the effect of Tenn. Code Ann. § 28-1-106 (2000)[2] was to toll the running of the period of limitations during the time the deceased was mentally incompetent, which incompetency, according to the plaintiff, was removed by his father's death.[3] The trial court granted the defendant's motion, holding that the statute of limitations was not tolled in this case in view of the fact that the deceased granted a durable power of attorney to the plaintiff prior to becoming incompetent. Plaintiff appeals. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

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[1]The complaint alleges that Centerville Health Care Center is owned by the defendant Chattanooga Medical Investors, LP, and the defendant Life Care Centers of America, Inc. For ease of reference, we will refer to the appellee in the singular, *i.e.*, as "the defendant."

[2]Tenn. Code Ann. § 28-1-106 provides as follows:

> If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or such person's representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the removal of such disability.

[3]*Cf.* ***Collier v. Memphis Light, Gas & Water Div.***, 657 S.W.2d 771, 774 (Tenn. Ct. App. 1983) (acknowledging that the death of a legally disabled individual removes the disability and begins the running of the statute of limitations).

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Brian G. Brooks and Richard E. Circeo, Nashville, Tennessee, for the appellant, Terry Sullivan, Administrator of the Estate of Charlie Sullivan.

Thomas O. Helton, Christy Tosh Crider, and John Phillips, Nashville, Tennessee, for the appellees, Chattanooga Medical Investors, LP, and Life Care Centers of America, Inc.

OPINION

I.

The operative facts in this summary judgment case are not in dispute.[4] On February 4, 1997, the deceased, who at the time was fully competent, granted a durable power of attorney to the plaintiff. The power of attorney is contained in a two-page, pre-printed, fill-in-the-blanks legal form and recites, in pertinent part, as follows:

> My attorney-in-fact shall act in my name, place and stead in any way which I myself could do, if I were personally present, with respect to the following matters, to the extent that I am permitted by law to act through an agent:
>
> (**NOTICE**: The principal must write his or her initials in the corresponding blank space of a box below with respect to each of the subdivisions (A) through (N) below for which the grantor wants to give the agent authority. If the blank space within a box for any particular subdivision is NOT initialed, NO AUTHORITY WILL BE GRANTED for matters that are included in that subdivision. Cross out each power withheld.)
>
> [s/CCS][5] (A) Real estate transactions
> [s/CCS] (B) Tangible personal property transactions
> [s/CCS] (C) Bond, share and commodity transactions
> [s/CCS] (D) Banking transactions
> [s/CCS] (E) Business operating transactions
> [s/CCS] (F) Insurance transactions

[4] While there appear to be disputes on some facts, those facts are not material to the issue upon which our judgment is based.

[5] CCS are the initials of the deceased.

[s/CCS] (G) Gifts to charities and individuals other than Attorney-in-Fact
[s/CCS] *(H) Claims and litigation*
[s/CCS] (I) Personal relationships and affairs
[s/CCS] (J) Benefits from military service
[s/CCS] (K) Records, reports and statements
[s/CCS] (L) Full and unqualified authority to my attorney-in-fact to delegate any or all of the foregoing powers to any person or persons whom my attorney-in-fact shall select
[s/CCS] (M) All other matters

Durable Provision:
[s/CCS] (N) If the blank space in the block to the left is initialed by the grantor, this power of attorney shall not be affected by the subsequent disability or incompetence of the grantor.

(Capitalization and bold print in original; emphasis added). As can be seen, the deceased separately initialed "subdivisions" (A) through (N). The deceased and the plaintiff signed the document in the presence of two witnesses[6] and the signatures of the deceased and the plaintiff were duly notarized. This durable power of attorney remained in effect during the remainder of the deceased's life.

Some four years later, on or about April 19, 2001, the deceased, who was then in his mid-80s and showing signs of cognitive loss and dementia, was admitted to the care of the defendant, a licensed and skilled nursing home. The plaintiff frequently visited the deceased during the latter's stay at the defendant's facility. The plaintiff would later testify that, at the time of his visits, he observed problems in the defendant's care and treatment of his father, which he believed were harmful to him. Subsequently, on or about August 13, 2001, the plaintiff transferred the deceased from the defendant's facility to another nursing home.[7] On November 26, 2001, the deceased passed away.

More than one year after the deceased was transferred from the defendant's facility, *but within one year of the death of his father*, the plaintiff filed this action[8] against the defendant, alleging negligence, gross negligence, negligence *per se* under the Tennessee Nursing Home Residents Rights Act, medical malpractice, wrongful death, and violations of the Tennessee Adult

[6] The witnesses also signed the power of attorney.

[7] The plaintiff sued the owners of the other nursing home, Baptist Hickman Community Health Services, Inc. dba Baptist Hickman Nursing Home and Millennium Medical Trust, Inc., as co-defendants in this action. In granting the plaintiff summary judgment as to Centerville pursuant to Tenn. R. Civ. P. 54.02, the trial court specifically stated that "there are remaining claims against the co-defendants." Thus, this appeal only addresses the plaintiff's suit against the owners of Centerville.

[8] Suit was filed on November 19, 2002.

Protection Act. The plaintiff alleged that, while in the defendant's care, the deceased developed multiple pressure sores, experienced poor hygiene, and suffered malnutrition, dehydration, physical pain, and mental anguish, and that these problems, which he asserted were caused by the defendant's action and/or inaction, ultimately led to the death of the deceased. During the course of the litigation, the trial court granted the defendant partial summary judgment, dismissing the plaintiff's claims based upon the Tennessee Adult Protection Act and negligence *per se* under the Tennessee Nursing Home Residents Rights Act. The plaintiff does not challenge the propriety of these rulings on this appeal.

At a subsequent time, the defendant moved for summary judgment on the remaining claims, arguing that the plaintiff's complaint was barred by the one-year statute of limitations found at Tenn. Code Ann. § 29-26-116 (2000).[9] Since the complaint was filed more than one year after the deceased left the defendant's facility, it is clear that the plaintiff's complaint as to the defendant was filed more than one year after the occurrence of any operative misconduct on the part of the defendant. The plaintiff strenuously argues, however, that the limitations period was tolled during the period of the deceased's mental disability. His authority for this position is Tenn. Code Ann. § 28-1-106. Therefore, according to the plaintiff, the applicable one-year statute of limitations did not begin to run until the deceased's disability was removed by his death. The trial court held a hearing on the issue and ruled that

> [the defendant was] entitled to summary judgment as a matter of law because [the plaintiff's] claim [was] barred by the one year statute of limitations, which was not tolled by [the deceased's] incompetency since [the deceased] had in place at the time of his residency at [the defendant's facility] through the date of his death a durable power of attorney in favor of his son, [the plaintiff]. [The plaintiff] filed this cause of action after the statute of limitations had run as to [the defendant].

In effect, the trial court held that the existence of the durable power of attorney prevented the limitations period from being tolled under Tenn. Code Ann. § 28-1-106. The plaintiff appeals this holding of the trial court.

II.

The plaintiff's brief presents the following two issues for our review:

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[9] The relevant portion of Tenn. Code Ann. § 29-26-116 provides as follows:

> (a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104 [the one-year statute of limitations "for injuries to the person"].

1. Whether Tenn. Code Ann. § 28-1-106 tolled the statute of limitations.

2. Whether the statute of limitations was tolled by the "discovery rule."

III.

In determining whether summary judgment is appropriate, a court must determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Since a motion for summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993). We must decide anew if summary judgment is appropriate.

IV.

The plaintiff's first issue presents a question of statutory construction: Is the tolling effect of Tenn. Code Ann. § 28-1-106 implicated when an individual, while competent, grants another a durable power of attorney, including the power to act for the grantor with respect to "claims and litigation"? The crux of both the defendant's argument and the trial court's holding in opposition to the application of § 28-1-106 is that, by granting a durable power of attorney, the deceased removed himself and the plaintiff from the ambit and protection of § 28-1-106.

The construction of a statute is a question of law for the court. ***Bryant v. Genco Stamping & Mfg. Co.***, 33 S.W.3d 761, 765 (Tenn. 2000). The Supreme Court addressed some of the primary principles of statutory construction as follows:

> [T]here are a number of principles of statutory construction, among which is the most basic rule of statutory construction: to ascertain and give effect to the intention and purpose of the legislature. However, the court must ascertain the intent without unduly restricting or expanding the statute's coverage beyond its intended scope. The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language, without a forced or subtle interpretation that would limit or extend the statute's application. Courts are not authorized to alter or amend a statute. The reasonableness of a statute may not be questioned by a court, and a court may not substitute its own policy judgments for those of the legislature. Courts must presume that the legislature says in a statute what it means and means in a statute what it says there.

Mooney v. Sneed, 30 S.W.3d 304, 306-07 (Tenn. 2000) (citations and internal quotation marks omitted). In construing statutes, courts presume that the legislature has "knowledge of its prior enactments and [] know[s] the state of the law at the time it passes legislation." ***Wilson v. Johnson County***, 879 S.W.2d 807, 810 (Tenn. 1994). Furthermore, in resolving potential conflicts between statutes, courts must seek a "reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws." ***LensCrafters, Inc. v. Sundquist***, 33 S.W.3d 772, 777 (Tenn. 2000).

With these principles in mind, we turn now to the specific statutes in question.

In pertinent part, Tenn. Code Ann. § 28-1-106 provides the following:

> If the person entitled to commence an action is, at the time the cause of action accrued, . . . of unsound mind, such person, *or such person's representatives and privies*, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, ...

(Emphasis added). "The legislative purpose involved in [§ 28-1-106] is to declare that statutes of limitation do not begin to run until a person's disability is removed." ***Arnold v. Davis***, 503 S.W.2d 100, 102 (Tenn. 1973). This means, as applied to the facts of the instant case, that no portion of the time the deceased was in the defendant's facility – during all of which time he was mentally incompetent as far as this record reveals – would have counted against the one-year statute of limitations had the deceased recovered of his mental disability and filed his own lawsuit against the defendant. It is important to note that the language of Tenn. Code Ann. § 28-1-106 clearly provides that the period of mental incompetency is also not chargeable, from a statute of limitations standpoint, against "such person's representatives and privies."

The defendant contends that the durable power of attorney executed in this case "mandated"[10] that the plaintiff handle all the deceased's "claims and litigation." It extrapolates from this that the plaintiff as the holder of the power of attorney, not the deceased, was "the person entitled to commence an action" as that language is found in the statute. From this, the defendant argues that since the plaintiff was of sound mind at all times and could have brought suit within the applicable one-year limitations period, § 28-1-106 is not implicated by the facts of this case. In our judgment, this is a strained construction of the language of the statute. The statute is designed to address the rights of one under an age or mental disability. It is clear to us that "the person entitled to commence an action" as that language is used in the statute refers to the person under the disability and not to one who holds his or her power of attorney.

[10] As pertinent to this part of the discussion, the power of attorney provides that "[m]y attorney-in-fact shall act in my name, place and stead in any way which I myself could do, if I were personally present . . . ."

The statute does not recite, expressly or by implication, that the tolling of the statute of limitations only occurs in those situations where there is no one authorized to act for the disabled individual. On the contrary, § 28-1-106 specifically grants the tolling protection not only to the disabled individual but also to his or her "representatives and privies." Though the plaintiff is the individual who brought the action, he brought it in a representative capacity for the alleged wrong done to the deceased. Thus, as we believe was intended by the legislature, the plaintiff, as Administrator of the deceased's estate, is a "representative[]" of the deceased and not "the person entitled to commence an action." We hold that the plain and ordinary meaning of the language of § 28-1-106 simply does not permit this court to conclude that "representatives and privies" does not cover the plaintiff in this case. We think it clearly does.

As an alternative, but intertwined, argument, the defendant asserts that the statute of limitations was not tolled under § 28-1-106 because, in later enacting the Uniform Durable Power of Attorney Act ("UDPAA"), the legislature intended to remove the disability of all those who grant a durable power of attorney. Thus, according to this argument, the protection of § 28-1-106 does not apply in this case because the deceased's disability was removed through his granting of a durable power of attorney to the plaintiff. The defendant relies upon the following UDPAA provision, codified at Tenn. Code Ann. § 34-6-103 (2001):

> All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of an bind the principal and the principal's successor in interest *as if the principal were competent and not disabled.*

(Emphasis added). In other words, the defendant argues that the language stating that principals will be bound by the acts of their attorneys in fact "as if the principal were competent and not disabled," has the effect of preventing the plaintiff from relying upon the provisions of § 28-1-106.

We agree that the quoted language means that a principal is bound by the attorney in fact's *acts* "as if the principal were competent and not disabled." However, § 34-6-103 addresses *actions*; it does not address *inaction, e.g.*, the failure to file suit on behalf of the grantor of the power. The two statutes – § 28-1-106 and § 34-6-103 – can be harmonized. While § 34-6-103 addresses the binding-on-the-principal effect of an *act* undertaken by a holder of a power of attorney it does not necessarily or logically follow that the holder of the power's *failure to act*, *e.g.*,the failure of the plaintiff in the instant case to file suit within the one-year limitations period, also "bind[s] ... as if the principal were competent and not disabled." In the final analysis, it is clear that § 34-6-103 only addresses the effect of an act of the attorney in fact and not a failure to act on his or her part.

We presume that the legislature was cognizant of the terms of § 28-1-106 when it enacted the durable power of attorney statutory scheme. *See* ***Wilson***, 879 S.W. 2d at 810. Had the legislature intended that the effect of § 34-6-103 would be to remove the tolling of § 28-1-106 in those situations where a durable power of attorney has been granted, it could have so stated. It did not, and

we find no basis in the statutory language for doing that which the legislature has failed to do by express language. We simply cannot agree with the defendant's interpretation, or the trial court's holding, on this issue. The execution of a durable power of attorney, even if it authorizes the attorney in fact to handle "claims and litigation," does not deprive the disabled person or the disabled person's "representative[]" of the tolling benefit of § 28-1-106.

In further support of our determination that the durable power of attorney in this case did not prevent the tolling protection afforded under § 28-1-106, we also note the existence of Tennessee caselaw in which our courts have held that the appointment of a *legal guardian* for a minor does not remove the protection of § 28-1-106. ***State ex rel. Brooks v. Gunn***, 667 S.W.2d 499, 501 (Tenn. Ct. App. 1984) (stating, under § 28-1-106 analysis, "[i]f the statute has not run as to the minor's claim, *a fortiori*, it has not run against his present guardian."); *see* ***State ex rel. Heirs of Howard v. Parker***, 67 Tenn. 495, 498 (1875) (rejecting the argument that the appointment of a guardian and the passing of the statute of limitations barred a suit, which was brought by the decedent's heirs).

V.

Having determined that the trial court erred in holding that the plaintiff's complaint was untimely filed, we need not reach the plaintiff's argument regarding the "discovery rule."

VI.

The judgment of the trial court is reversed. This case is remanded to the court below for further proceedings, consistent with this opinion. Costs on appeal are taxed to the appellees, Chattanooga Medical Investors, LP and Life Care Centers of America, Inc.

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CHARLES D. SUSANO, JR., JUDGE